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In the Supreme Court of the United States

OCTOBER TERM, 1960

MICHAEL M. KEARNEY AND MICHAEL M. KEARNEY AND CLINTON M. HESTER, A SPECIAL PARTNERSHIP, AND MICHAEL M. KEARNEY AND CLINTON MONROE HESTER, A GENERAL PARTNERSHIP D/B/A LAW OFFICES, CLINTON M. HESTER, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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OPINIONS BELOW

The opinion of the Court of Claims (R. 144)[1] is reported at 285 F. 2d 797.

JURISDICTION

The order of the Court of Claims dismissing petitioners' claim was entered on January 18, 1961 (R. 148). A motion for rehearing was filed on March 22, 1961, and denied on March 31, 1961. The petition for

[1] "R" refers to the record in the Court of Claims which has been filed in this Court.

a writ of certiorari was filed on April 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners' claim is barred by the Anti-Assignment Act.

STATUTE INVOLVED

The Anti-Assignment Act, R.S. 3477, as amended, 31 U.S.C. 203, provides in pertinent part:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *
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> * * * * *

STATEMENT

Petitioners brought this action on the theory that the United States had taken a property right from them by destroying a charging lien which they held on a judgment. The Court of Claims denied recovery on the ground that the charging lien was void under the Anti-Assignment Act. The relevant facts may be summarized as follows:

Petitioners were employed by R. Stanley Dollar, the Dollar Steamship Line and others (the Dollars) to recover from the Maritime Commission certain shares of common and preferred stock of Dollar Steamship Line, Inc., Ltd., which the Commission held under a claim that title to the stock was in the United States. Petitioners and the Dollars executed a contingent fee contract which assigned to petitioners 225,000 of the Class B stock if they were successful (R. 2).

Protracted litigation between the Dollars and the government ensued. The Court of Appeals for the District of Columbia Circuit held that the Dollars were entitled to possession of the stock. *Dollar* v. *Land,* 184 F. 2d 245 (C.A.D.C.), certiorari denied, 340 U.S. 884. However, since this Court had previously held that the final order would not pass on the title rights of the United States, but only on the possessory rights of the Maritime Commission (330 U.S. 731), the United States immediately instituted an action in the United States District Court for the Northern District of California to try its title to the stock, 97 F. Supp. 50. This led to further motions and appeals, and to contempt citations against certain government officials.

On or about June 12, 1952, a compromise of the litigation was effected. Under the settlement agreement, the stock in controversy was transferred to a trustee, who was to sell it and divide the proceeds equally between the two parties (R. 6, 7). A settlement was later made as to an additional 13,061 shares of Class A stock, and these were also transferred to the trustee (R. 10).

Following the settlement, petitioners instituted an action against the Dollars in the Delaware state courts on September 10, 1952, to enforce a charging lien, which allegedly arose from the decision of the Court of Appeals for the District of Columbia Circuit, on the 225,000 shares of Class B stock (R. 7, 8). On October 31, 1952, they petitioned the court to enjoin the proposed sale of the stock by the trustee (R. 8). When the court conditioned such an injunction on the posting of a $1,000,000 bond, petitioners withdrew their motion and the trustee completed the sale (R. 8).

On or about April 1, 1953, petitioners released in writing the Dollars and "any and all other persons and corporations whether named or referred to above or not" from all claims for legal services in connection with the Dollar litigation, and quitclaimed to the trustee "any and all liens or interest in any of the stock * * * acquired by virtue of any services performed in said Dollar litigation * * *." The Dollars paid petitioners $75,000 as consideration for this release of their claim for legal services and of their interest in the stock (R. 47–53). More than six years later, petitioners brought this action against

the United States to obtain further compensation for their legal services.

In their complaint, petitioners asserted that they possessed a valid attorney's lien on the stock, and that this lien vested when the Court of Appeals for the District of Columbia Circuit adjudged the Dollars entitled to the possession of the stock. They contended that they were deprived of this property right when the government refused to surrender the stock to the Dollars (R. 4, 5). Petitioners also alleged that the settlement between the Dollars and the United States was without authority of law (R. 6).

The government moved for summary judgment on the grounds that the release signed by petitioners barred the action (R. 32–36), that limitations had run (R. 36–40), and that the lien asserted was a nullity under the Anti-Assignment Act (R. 40–42). The Court of Claims granted the motion (R. 144). Indicating that it regarded the Government's other defenses as meritorious, it rested its holding on the applicability of the Anti-Assignment Act (R. 147). The court held that this statute prohibits a contingent fee contract which gives an attorney an interest in the claim against the government. The court further stated that any lien or equitable interest arising as a result of such an invalid contract is also void (R. 148):

> Call it an attorney's lien, an assignment, an equitable interest or by any other name, the contract between the plaintiffs and the Dollars

gave over to plaintiffs an interest in their client's claim against the Government. This was precisely the evil that Congress intended to outlaw by the anti-assignment statute.

ARGUMENT

The principles laid down by this Court in *Nutt* v. *Knut,* 200 U.S. 12, and by the Court of Claims in *Pittman* v. *United States,* 127 Ct. Cl. 173, are controlling here. In these cases it was held that the Anti-Assignment Act applies to a contingent fee contract which assigns an attorney an interest in the client's claim against the United States.

Petitioners seek review by this Court on the grounds (1) that their contingent fee contract did not give them an interest in a claim against the government because the client's claim was asserted by the petitioners against the Commissioners individually or, alternatively, against the Maritime Commission as an entity separate and apart from the United States, and (2) that even if a claim was asserted against the government, petitioners' charging lien conveyed to them a valid interest in the claim since the lien arose by operation of law.

Since this case turns entirely upon the application of the principles of *Nutt* and *Pittman* to the particular facts and circumstances, no principle of general importance is involved. Moreover, the decision below is correct and in no way conflicts with the courts of appeals' decisions cited by petitioners. The petition should therefore be denied.

1. The claim asserted by the Dollars was clearly a claim against the United States. The Maritime

Commission is not a corporate entity separate from the United States, but is a governmental agency entrusted with the development and maintenance of a merchant marine in the interest of national defense and commerce. It is responsible to Congress for its actions, and all of its financial transactions must be audited in the General Accounting Office (Act of June 29, 1936, Ch. 858, 49 Stat. 1985, §§ 207, 208).

The Commission is unlike the Fleet Corporation, which was involved in *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 3 F. 2d 154 (E.D.N.Y.); *Charles Nelson Co.* v. *United States*, 11 F. 2d 926 (W.D. Wash.), and *Rhodes* v. *United States*, 8 F. Supp. 124 (E.D.N.Y.), upon which petitioners rely. The Fleet Corporation was a private corporation formed by the United States Shipping Board, predecessor of the Maritime Commission, to conduct private business. It issued capital stock to the public and had a board of trustees which was not appointed by the President with Senate approval. *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 294 Fed. 641 (C.A. 2), certiorari denied *sub nom. United States Shipping Board* v. *Chase National Bank*, 264 U.S. 586. Thus, the *Downey*, *Nelson* and *Rhodes* cases are inapplicable to the Maritime Commission because they only hold that R.S. 3477 does not forbid the assignment of claims against such private business organizations as the Fleet Corporation.

Petitioners rely on *Land* v. *Dollar*, 330 U.S. 731, where this Court held that the United States was not a party to the action against the Maritime Commission for possession of the stock, for the proposition that

their client did not assert a claim against the United States. However, the Dollars made a claim against the United States in that action when they contended that the government did not have title to the stock. Furthermore, petitioners knew when they entered into their contract with the Dollars that the basis of any action that they brought would be a claim denying United States ownership. For petitioners to contend that no claim was asserted against the United States is to ignore the essentials of the claim which they asserted.

2. Petitioners apparently concede that, if the Dollars were asserting a claim against the United States, an express assignment of an interest in that claim would be void under the Anti-Assignment Act. However, petitioners attempt to achieve the same result indirectly by asserting that their charging lien conveyed, by operation of law, the 225,000 shares of Class B stock that they were to receive under the contract.

But a charging lien is itself invalid under R.S. 3477 because the lien gives the attorney a part of the client's claim and thereby creates the possibility of multiple liability on the part of the government. Moreover, where the express assignment in the contingent fee contract has been held invalid, the courts have denied attempts to establish an equitable lien by operation of law. *Lindberg* v. *Humphrey*, 289 Fed. 901 (C.A.D.C.); *JBP Holding Corp.* v. *United States*, 166 F. Supp. 324 (S.D.N.Y.), reversed on other grounds *sub nom. Application of Kamerman*, 278 F. 2d 411 (C.A. 2); *Pittman* v. *United States*,

127 Ct. Cl. 173. Petitioners may not do by "operation of law" that which the law itself forbids.[2]

3. Petitioners are also barred from proceeding by the release which they executed. The language of the release is broad enough to include the United States. Additionally, the quitclaim of the interest in the stock was in substance a transfer to the United States, since the trustee held the stock as agent of the United States and the Dollars.[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] The "operation of law" exception has ordinarily been limited, as stated in the *Lindberg* case, *supra*, 289 Fed. at 905–906, to assignments which pass title from the original claimant by will, descent, bankruptcy and insolvency, and general assignments for the benefit of creditors.

[3] In the event that certiorari is granted, the government may also urge that petitioners' claim is barred by the statute of limitations.

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